November 2019

Decision in CPLR Article 78 proceedings - Zarro, Francis A., Jr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

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In the Matter of the Application of
FRANCIS A. ZARRO, JR.
DIN: 04-A-6204,

DECISION/ORDER

Petitioner,

-against-

Index No. 6073-13
R.J.I. No. 10-13-0271
Richard Mott, J.S.C.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, and NEW YORK STATE BOARD OF PAROLE,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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Motion Return Date: July 22, 2013

APPEARANCES:

Petitioner: Orlee Goldfeld, Esq.
Hollyer Brady, LLP
60 East 42nd Street, Suite 1825
New York, NY 10165

Respondents: Eric T. Schneiderman, Esq.
Attorney General of the State of New York
The Capitol
Albany, NY 12224-0341
Keith A. Muse, Esq., Assistant Attorney General, of Counsel

Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondents' January 18, 2012 decision denying him release on parole.

Petitioner is serving a sentence of 7 to 21 years following his conviction in Dutchess County on November 18, 2004[1].

Petitioner is a 62-year old disbarred lawyer who also holds a Master's Degree in Public Administration. He has been married to his high school sweetheart for more than 38 years. He has three children and three grandchildren. He has no history of violence, alcohol, sex or drug abuse whatsoever. He has no prior convictions, and significantly, the subject convictions are all non-violent.

Petitioner was presumptively eligible for parole[2] when he initially met the Parole Board in March, 2011 (see, Correction Law §805). By then he already had served more than 8 years, far in excess of his 16-to-30 month guideline, as confirmed in his Inmate Status Report[3]. His COMPAS evaluation determined him to be in the lowest possible risk category to re-offend, abscond or to be arrested. He has participated in the DOCCS work release program (see, Correction Law §855(4) and 7 N.Y.C.R.R. §1900.4(j)(4)) without

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[1]Petitioner was convicted in a non-jury trial of 13 charges: Grand Larceny in the First Degree, Grand Larceny in the Second Degree (5 Counts), Criminal Possession of Stolen Property in the Second Degree (4 counts), Grand Larceny in the Third Degree (2 Counts), and Scheme to Defraud. Petitioner was acquitted of 25 counts. The Prosecution initially offered Petitioner a plea having a 5 to 15 year indeterminate sentence. At sentencing, the prosecution requested the imposition of a 7 to 21 year indeterminate term of imprisonment.

[2]Correction Law §805 "creates a presumption in favor of parole release of any inmate, who like petitioner, has received a certificate of earned eligibility and has completed a minimum term of imprisonment of eight years or less (citations omitted)." *Wallman v. Travis*, 18 A.D.3d 304, 307 (1st Dept. 2005).

[3]The Inmate Status Report relied upon by the Board in the subject determination was prepared in December, 2010, for his initial Board appearance in March, 2011, and was not updated.

incident since November 3, 2011, having been approved for continuous work release[4] by the Temporary Release Committee on September 9, 2011. This program requires that he stay overnight in prison only two nights per week, but otherwise permits him to be at liberty to work in the community and reside with his wife. While on work release he organized two, multi-date conferences on restorative justice, and mentored students at Skidmore College. In sum, he has demonstrated throughout his time on work release that he has been working and assimilating safely into the community.

While incarcerated over the past nine years, Petitioner had no disciplinary infractions whatsoever. He completed all mandated programs, including Transitional Service Phases I through III and the Inmate Program Assistant training. Further, Petitioner volunteered thousands of hours helping other inmates. He worked in the law library assisting other inmates with their education. His efforts improved the library to such an extent that it became a prototype for other prison libraries. He served as a Program Aide for the Veterans Administration; he served as a curriculum coordinator since 2006, teaching classes about government, civics, history and business. He organized an oratory contest, a debate, a mock trial and a poetry event. He also taught baptism, communion and confirmation, as well as philosophy classes in the chapel. He attended Catholic services regularly. Indeed, his exemplary conduct in prison prompted a DOCCS[5] Correction Counselor to write on June 14, 2011, on behalf of the staff who worked with him, that it had

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[4]Such approval was confirmed by the Superintendent of Mount McGregor, subsequently approved by the Office of the Inspector General, and finally by the Assistant Commissioner of the Temporary Release Program in Albany.

[5]The Panel had before it three additional recommendations from DOCCS officials, all advocating for Petitioner's release on parole.

been a "pleasure" working with him and that "his release to parole supervision will be in the best interest of the community." Petition, Exhibit "E." In addition, Petitioner presented a parole plan including employment, a stable residence, and family and community support. Nevertheless, in the face of this overwhelming demonstration of his likelihood to succeed on parole, Petitioner incomprehensibly was denied parole. The panel stated:

> Denied. 24 months. March 2013.
>
> Notwithstanding the Earned Eligibility Certificate, after a review of the record and interview, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society.
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> This decision is based on the following factors: Your instant offenses are grand larceny first degree, grand larceny second degree, grand larceny third degree, criminal possession of stolen property second degree, and scheme to default first degree which you presented as a successful entrepreneur, created shell companies, solicited and received loans, fees, services and goods from multiple victims. As a result of your scheme, numerous victims lost significant amounts of money.
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> Note is made of your de novo status, rehabilitation efforts, letters of support, work release status, sentencing minutes, faxed material, multiple confidential materials, significant opposition to your release, your disbarment for misallocating funds and all other required factors were considered. You continue to fail to accept responsibility for your actions and show little if any remorse. Your repeated actions over several years causing serious damage to the finances of multiple victims demonstrates the risk you pose. Parole is denied.

The Parole Board's Discretion

It is well settled that release on parole is a discretionary function of the Parole Board and that its determination will not be disturbed by the Court unless it is shown that

the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 N.Y.2d 470 (2000); *Matter of King v. NYS Division of Parole*, 190 A.D.2d 423 (1st Dept. 1993) aff'd 83 N.Y.2d 788 (1994). In reviewing the Board's decision, the Court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute. *Matter of Thwaites v. New York State Board of Parole*, 34 Misc.3d 694 (2011).

The Parole Board is required to consider a number of factors in determining whether an inmate should be released on parole. Executive Law §259-i, *Matter of Malone v. Evans*, 83 A.D.3d 719 (2d Dept. 2011) and cases cited. While the Board need not expressly discuss each of these factors in its determination (see, *Matter of King v. New York State Division of Parole*, 83 N.Y.2d 788, 790 (1994)) or afford these factors equal weight (see, *Matter of Wan Zhang v. Travis*, 10 A.D.3d 828 (3d Dept. 2004)), it is the obligation of the Parole Board to give fair consideration to each of the statutory factors, and where, as here the record convincingly demonstrates that the Board in fact failed to consider the proper factors, the Court must intervene. *Matter of King v. New York Division of Parole*, 190 A.D.2d at 431.

Focusing Exclusively On The Crime And Purported Lack of Remorse

Here, the Court finds that the Board's decision focused exclusively on Petitioner's crime and his alleged lack of remorse.

While the seriousness of the crime remains acutely relevant in determining whether Petitioner should be released, the record demonstrates conclusively that the Board failed to

take into account and fairly consider any of the other relevant statutory factors. See, e.g., *Matter of Silmon v. Travis*, 95 N.Y2d at 476-7. Indeed, the Board's rote, perfunctory recitation of the factors it considered here manifestly is inadequate to demonstrate that it fairly weighed and considered those statutory factors. See, e.g., *Matter of Rios v. New York State Division of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561 (Kings County, 2007).

Specifically, the record demonstrates that the Board inexplicably failed to consider and weigh the myriad, previously enumerated, relevant factors, which very strongly militate in favor of Petitioner's release on parole[6]. Indeed, as aforementioned, the Board denied Petitioner parole solely because of the nature of his crimes and his lack of remorse; the former, being immutable, and the latter, simply not borne out by the record.

The Board may consider an inmate's remorse or lack of it. See, e.g., *Graziano v. Evans*, 90 A.D.3d 1367, 1369 (3d Dept. 2011), *Matter of Dobranski v. Evans*, 83 A.D.3d 1355 (3d Dept. 2011) and cases cited. Here, Petitioner expressed remorse in his March, 2011 hearing (Petition, Exhibit "C", 5-6, 7, 8), at the January, 2012 hearing (Petition, Exhibit "G", 6, 8, 9, 10), and in the Inmate Status Report (Petition, Exhibit "B"). In fact, the Inmate Status Report found his expression of remorse to be genuine. However, *in camera* documents[7]

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[6]The Parole Board's conclusion that Petitioner "would not live and remain at liberty without again violating the law" patently is belied by DOCCS's prior determination granting him temporary work release. Correction Law §855(4) permits temporary work release only when a committee determines that "a temporary release program for the applicant is consistent with the safety of the community and the welfare of the applicant." 7 N.Y.C.R.R. §1900.4(j)(4) provides that temporary release should not be granted "if...presence in the community... would pose unwarranted threat to their own or public safety, if public reaction is such that the inmate's successful participation in the program would be made difficult and public acceptance of the temporary release program would be jeopardized..."

[7]The Court is exasperated by the Attorney General's failure to append these crucially relevant documents to Respondents' Answer or to submit them for *in camera* review.

from a present and a former Attorney General, submitted to the Board in February, 2011, thoroughly vilify Petitioner and dispute the sincerity of his expressions of remorse based upon testimony adduced at his 2003 trial and by reason of his ongoing post conviction litigation. These documents contain a 24-page excerpt from Petitioner's trial, which the Court deems to be stale, cumulative and not probative of Petitioner's present remorse or lack thereof. The documents are relevant solely to the details of Petitioner's crimes. Further, the inference drawn from post conviction exhaustion of one's statutory right to appeal and pursuit of collateral remedies as demonstrative of a lack of remorse is at best problematic and dubious in the circumstances of this case. The record demonstrates that Petitioner has repeatedly expressed his remorse, has not maintained his innocence since being convicted, and has not contradicted his plea allocution. See, e.g., *Matter of Sillmon v. Travis*, 95 N.Y.2d at 478. Indeed, the Board arbitrarily concluded that Petitioner lacked remorse. See, e.g., Executive Law §259-i(2)(a)(requiring that the reasons for denial of parole "be given in detail and not in conclusory terms"), *Matter of Malone v. Evans*, 83 A.D.3d 719 (2d Dept. 2011). As in *Oberoi v. Dennison*, 19 Misc.3d 1106(A), 2008 WL 733683 (2008), this Court has serious abiding reservations as to the rationality of the Board's determination to the extent that it is based upon Petitioner's lack of remorse.

Exhibit "C" to the Answer included a Memorandum stating that after the completion of the Inmate Status Report, the Attorney General submitted a response to the Parole Board which documents were "on file," but which curiously were not submitted to the Court. Rather, the Court had to direct that such documents be produced. The documents, which Petitioner's counsel has not seen, comprise an emotional, prolix invective about Petitioner's crimes, replete with conclusions that Petitioner is "incorrigible," "unrepentant," "relentless", and "heartless." This diatribe repeatedly states that it is the fervent belief not only of the authors but of the Attorney General's Office that Petitioner presents a continuing danger to society and should not be released on parole.

Clearly, as in *Oberoi*, it was "incumbent upon the Board to go beyond its terse, conclusory assertion" that Petitioner lacked remorse.

Ineluctably, the *in camera* submissions clearly conveyed to the Panel the Attorneys' General negative appraisals of Petitioner which advocated for the denial of parole. Put simply, submission of such materials, and the Board's focus on them, supplanted consideration of the numerous statutory factors which overwhelmingly support the granting of parole, thereby rendering Petitioner's denial of parole a foregone conclusion, one that does not comport with statutory requirements. See, e.g., *Matter of Winchell v. Evans*, 32 Misc.3d1217(A), 2011 WL 2811465 (Sullivan County, 2011). The Board concluded, "There is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society." Such an arbitrary decision, based upon this record, could be reached solely by ignoring statutorily required factors. See, e.g., *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)("An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.") See, e.g., *Matter of Wallman v. Travis,* 18 A.D.3d 304 (1st Dept. 2005), *Matter of Coaxum v. New York State Board of Parole*, 14 Misc.3d 661 (Bronx County, 2006), *Matter of Weinstein v. Dennison*, 7 Misc.3d 1009(A), 2005 WL 856006 (New York County, 2005).

The 2011 Statutory Amendment

Petitioner asserts, *inter alia*, that the Parole Board did not follow applicable statutes and regulations regarding risks and needs assessment as mandated by the 2011

amendment of Executive Law §259-c(4). This Court agrees. Further, in the absence of written regulations indicating the adoption of a rule or regulation with regard to assuring an inmate an appropriate risk assessment and/or a review of the assessment document for errors before the Board considers it (see, e.g., *Matter of Cotto v. Evans*, 2013 WL 486508 (St. Lawrence County, 2013)), the Board cannot satisfy the requirement of Executive Law §259-c(4) that Respondents adopt written rules and regulations to implement the statutory changes.

Respondents argue that the 2011 amendments to Executive Law §259-c(4) do not apply in this case[8]. Respondents concede that the amendments to Executive Law §259-c(4) and Corrections Law §71-a became effective on October 1, 2011 (Affirmation of Keith Muse, ¶88), but because Petitioner's January 18, 2012 Parole Board interview was denominated by Respondents "a de novo interview of his interview of March 16, 2011" (Affirmation, ¶90), Respondents claim that the statutory changes in effect on that date somehow do not apply. This preposterous argument is entirely without merit. See, *Garfield v. Evans*, 108 A.D.3d 830 (3d Dept. 2013). Petitioner first appeared before the Board on March 16, 2011, was denied parole, and was held for 24 months. That decision was reversed on administrative appeal because the Board failed to articulate on the record specific language denoting that the presumption of release created by Petitioner's Earned Eligibility Certificate had been overcome. It remains a mystery[9] how the Board's obvious error in the

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[8]Respondents apparently concede that the instant hearing was not conducted in accord with the requirements of the 2011 statutory amendments.

[9]Nothing in the language or legislative history of the 2011 amendments to Executive Law §259-c(4) and Correction Law §71-a even hints that the statutory requirements are inapplicable to a *de novo* hearing conducted after the statutes' effective dates. The only

March, 2011 interview disqualifies Petitioner from vested statutory benefits and at the same time immunizes Respondents from performing their obligations under the statutory amendments. See, e.g., *Alami v. Volkswagen of America*, 97 N.Y.2d 281, 286 (2002)(discussing the basic principle in equity that one may not benefit from one's own wrong).

Accordingly, for the reasons set forth in *Matter of Morris v. New York State Department of Corrections and Community Supervision*, 963 N.Y.S.2d 852, 2013 NY Slip Op 23135 *amended* 39 Misc.3d 1213(A), 2013 WL 168901 (2013), the determination of the Parole Board is hereby vacated as unlawful, arbitrary and capricious.

Further Relief

Petitioner requests that the Court issue an order "[d]irecting Respondents to establish written risk assessment procedures for parole determinations relating to inmates with a Certificate of Earned Eligibility and to use them with respect to Mr. Zarro's request for parole" and to "[d]irect Respondents to prepare a Transitional Accountability Plan for Mr. Zarro." Since the parties have not briefed the question of the Court's authority to issue such an order either as to Petitioner alone or to a group of inmates, the Court directs the parties by August 30, 2013, to submit Memoranda of Points and Authorities with regard to such requested relief.

The matter is remanded to the Board which, on or before August 15 , 2013, shall

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possible reading of these statutes is that they apply with full force and effect to all hearings conducted after their effective date. See, e.g., *Matter of McCaskell v. Evans*, 2013 N.Y.Slip Op. 05284, 2013 WL 3466715 (3d Dept. 2013).

hold a new parole hearing consistent with this Decision and Order and issue a decision within two days thereof, a copy of which forthwith shall be provided to the Court.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Petitioner, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Claverack, New York
August 8, 2013

ENTER

RICHARD MOTT, J.S.C.

Documents Considered:

1. Order to Show Cause, dated May 29, 2013, Verified Petition dated May 28, 2013 with Exhibits A-V;
2. Answer, dated July 17, 2013, Affirmation of Keith A. Muse, Esq., dated July 17, 2013 with Exhibits A-N; Affirmation of Terrence X. Tracy, Esq. ,dated July 16, 2013 with Exhibits A-C;
3. Reply Affirmation of Orlee Goldfeld, Esq., dated July 19, 2013;
4. Letter of Keith Muse, Esq., dated July 23, 2013 with attached materials;
5. Letter of Keith Muse, Esq., dated July 31, 2013, with Institutional Parole File.